15

No. 92-1074

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.
Petitioner,
v.

HARRIS TRUST AND SAVINGS BANK,
As Trustee of the Sperry Master Retirement Trust No. 2,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE FOR CERTAIN UNITED STATES SENATORS AND REPRESENTATIVES IN SUPPORT OF RESPONDENT

HON. HOWARD M. METZENBAUM
U.S. Senator
Counsel of Record
140 Russell Senate Office
Building
Washington, D.C. 20510
(202) 224-2315

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

24 pp

QUESTION PRESENTED

Whether petitioner John Hancock Mutual Life Insurance Company ("Hancock") is a fiduciary under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"), with respect to the portion of the assets it holds pursuant to Group Annuity Contract No. 50 which are not associated with guaranteed benefits.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1074

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

HARRIS TRUST AND SAVINGS BANK,
As Trustee of the Sperry Master Retirement Trust No. 2,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE FOR CERTAIN UNITED STATES SENATORS AND REPRESENTATIVES IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

This case raises an important issue concerning the interpretation of ERISA § 401(b)(2) and, therefore, the scope of ERISA's fiduciary rules as they apply to insurance company control of pension plan assets. Amici are United States Senators and Representatives, including the chairman of the Subcommittee on Labor, Committee on Labor and Human Resources, United States Senate, and the chairman of the Subcommittee on Labor-Management Relations, Committee on Education and Labor, United States House of Representatives (both of which have jurisdiction over ERISA), who are especially concerned about the need to protect and secure pensions for Amer-

ica's workers and retirees. Amici believe that the position taken by the United States inaccurately interprets Congressional intent as well as the language of ERISA and leaves workers and retirees inadequately protected by federal and state law.

SUMMARY OF ARGUMENT

A. The Second Circuit's opinion correctly interprets the plain language of ERISA § 401(b)(2). ERISA is an expansive remedial statute, and exemptions such as that contained in ERISA § 401 must be strictly and narrowly construed.

B. Contrary to the arguments made by Hancock and the United States, the legislative history and intent of ERISA support the Second Circuit's reading of the statute. The Congress intended a narrow, precise exemption.

C. The Department of Labor's Interpretive Bulletin 75-2 cannot be read to interpret ERISA § 401(b)(2). On its face, IB 75-2 relates to prohibited transactions and not ERISA's fiduciary duty provisions. Read as the United States suggests, IB 75-2 contradicts ERISA § 401(b)(2) and cannot stand.

D. The overriding purpose of ERISA, protection of workers' and retirees' pension benefits, would be undermined by the court-created exemption sought by Hancock and would leave tens of millions of workers and retirees at risk. The recent spate of insurance company failures, such as Executive Life Insurance and Mutual Benefit Life, demonstrates the need for fiduciary responsibility by insurance companies whenever they act as pension fund investment managers. Hancock and the insurance industry's claim that these contracts cannot be designed to comply with ERISA is untrue. In similar cases, when risk to pension plan policy holders has arisen, the insurance industry has restructured similar contracts to provide adequate protection to pension plans.

ARGUMENT

I. THE DECISION BELOW CORRECTLY INTERPRETS ERISA § 401(b)(2) AS A LIMITED EXCEPTION TO ERISA'S FIDUCIARY RULES, NOT THE BROAD EXEMPTION THE INSURANCE INDUSTRY ASKS THIS COURT TO CREATE

A. ERISA § 401(b)(2) Is Narrow And Precise; It Should be Strictly Construed By The Courts

ERISA is a broad remedial statute designed to secure pension assets for the eventual payment of pension benefits to America's workers, retirees and their beneficiaries. ERISA § 2. To the extent any person exercises authority or control over pension "plan assets," he or she is a fiduciary, bound by ERISA's strict fiduciary responsibility requirements. The fiduciary responsibility rules are the cornerstone of ERISA: pension plan assets must be prudently managed and invested in order to ensure the future payment of promised retirement benefits. ERISA §§ 3(21), 404, and 406. Contrary to Hancock's assertion, both the language of the statute and the intent of ERISA as a whole, make clear that exceptions to the fiduciary responsibility requirements should be read narrowly.

Although ERISA contains no definition of "plan assets," ERISA § 401(b) contains two narrow exceptions from the term for: 1) plan investments in registered investment company securities and 2) insurance company "guaranteed benefit policies." ERISA defines a "guaranteed benefit policy" as:

> an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

ERISA § 401(b)(2)(B). Thus, an insurance company that has discretionary control over assets invested by a

pension plan pursuant to a "guaranteed benefit policy" in which the insurer has guaranteed to provide fixed retirement benefits, is not an ERISA fiduciary as to the funds used to purchase those guaranteed benefits. Conversely, an insurer that has discretionary control over assets for which there is no retirement guarantee, is a fiduciary under ERISA. This limited exception makes practical sense; the fiduciary responsibility rules should apply unless the insurer has agreed to provide comparable retirement protection to workers and retirees under all circumstances, including poor investment performance.

The Second Circuit Court of Appeals adopted this common-sense interpretation of the plain language of the statute, holding that Hancock was only exempt from ERISA's fiduciary rules "to the extent" it manages pension assets supporting retirement benefits guaranteed by the insurer. To the extent Hancock has discretionary control over pension monies which do not support benefits guaranteed by the insurer, the assets are "plan assets" and Hancock is an ERISA fiduciary. *Harris Trust & Savings Bank v. John Hancock Mutual Life Ins. Co.*, 970 F.2d 1138 (2d Cir. 1992); *see also Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983).

It is settled that when a court interprets an exemption or exception to remedial legislation, the exemption must be narrowly and strictly construed. *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 n.33 (1981). Following this well-settled rule and resorting to the "plain language" of the statute, the Second Circuit correctly rejected the holdings of the district court and the Third Circuit. *Mack Boring and Parts Corp. v. Meeker Sharkey Moffitt, Actuarial Consultants,* 930 F.2d 267 (3rd Cir. 1991); *Harris Trust & Savings Bank v. John Hancock Mutual Life Ins. Co.*, 722 F. Supp. 998, 1011-20 (S.D. N.Y. 1989) (*"Harris I"*).

Nevertheless, Hancock, the insurance industry, the states of New York and Massachusetts, and the United States ask this Court to interpret ERISA § 401(b)(2)(B) so as to immunize all pension plan investments in insurance company general account products because, under state law, all general account contracts give policyholders the "option" to purchase guaranteed benefits even though potentially at draconian below market purchase rates. These purchase provisions transfer no risk to the insurer because the insurer does not guarantee the price of annuities in advance nor the amount of money that will be required to purchase such benefits in the future. The investment risk remains entirely with the pension plan.

Congress rejected a broad exemption for all guaranteed benefit policies. A blanket exemption for all general account contracts had been part of the Senate version of the draft legislation, but was *deleted* in Conference Committee and does not appear in the law as enacted by Congress and signed by the President. *Compare* S.4, 93d Cong., 1st Sess. §§ 501(17)(B), 510 (1973), *reprinted in* 1 Legislative History of ERISA at 147, 170 (Comm. Print 1976), *with* ERISA § 401(b)(2)(B).[1] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be *presumed that the limitation was not intended.*" *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (emphasis added).

We believe that Judge Posner correctly concluded in 1983 that:

> The pension trustees did not buy an insurance contract with a fixed payout; they turned over the assets of the pension plan to [the insurance company] to manage with full investment discretion, subject only to a modest income guaranty. If the pension plan

[1] The Senate version of ERISA provided that the fiduciary provisions would not apply to "funds held by an insurance carrier unless that carrier hold funds in a separate account."

> had hired an investment advisor and given him authority to buy and sell securities at his discretion for the plan's account, the advisor would be a fiduciary within the meaning of the act, and that is essentially what the Trustees did during the accumulation phase of the contract . . . .

Peoria Union, 698 F.2d at 327. By the same token, the non-guaranteed portion of GAC 50 offers neither benefit nor investment guarantees and, therefore, is not a "guaranteed benefit policy" as to that portion.

Moreover, in spite of the plain limitation contained in ERISA § 401(b)(2)(B) that an insurance policy or contract may only be treated as a guaranteed benefit policy "to the extent that" it provides for guaranteed benefits, petitioner and its *amici* argue that GAC 50 is a "guaranteed benefit policy" under ERISA. A careful examination of the operation of the policy, however, contradicts that conclusion.

The guarantee provided under GAC 50 was a promise that monthly benefits would be paid to a fixed group of annuitants for a fixed period of time (for life) in a fixed amount. However, under GAC 50, no annuity to secure those benefits is actually intended to be purchased. Instead, plan assets were transferred to the insurance company and placed on deposit in the company's general account. In theory, under the type of guaranteed benefit policy contemplated by ERISA § 401(b)(2), the amount deposited would equal the liability of the insurance company to provide the guaranteed benefit as described above. In fact, however, the value of the liability of the insurance company during each year of the life of the contract (i.e., until the last annuitant dies) varies based on the actuarial assumptions used to calculate that liability. GAC 50 purports to fix the value of these liabilities at the time of the contract by specifying the actuarial assumptions to be used (particularly the assumed interest rate to be applied to the investment of the plan assets in the general account of the insurance company). These

interest assumptions have tended to be conservative (i.e., lower than market), thus having the effect of overstating the actual liability and reducing the amount of "free funds" otherwise attributable to the contract.[2] As a practical matter, however, the liability actually guaranteed by GAC 50 is a function of its "true" actuarial value (e.g., the value based on current interest rates) in effect when the annuitants received their monthly payments. As real interest rates fluctuate and the actuarial present value of the benefits payable to participants changes over time, the value of the guarantee changes. Thus, some portion of the assets may not be attributable to guaranteed benefits. To the extent that amounts exist that are in excess of what would have been necessary to purchase an annuity providing the guaranteed benefits (although under GAC 50 no annuity was actually to be purchased), those amounts represent the non-guaranteed portion of the policy or contract and, consistent with ERISA § 401(b)(2) should be considered plan assets. Hence, consistent with the Second Circuit's opinion, Hancock is a fiduciary with respect to the non-guaranteed portion of the policy. To hold otherwise would read out of existence the clear limitation that Congress placed on the circumstances under which assets in the general account of an insurance company could be exempt from ERISA's fiduciary rules.

B. Contemporaneous Legislative History Of ERISA § 401(b)(2) Reinforces the Second Circuit's Interpretation

The legislative history supports this conclusion. The Conference Report clearly anticipates the bifurcation of a single policy into guaranteed and non-guaranteed portions for the purpose of determining what constitutes plan assets:

---

[2] "Free funds" are the excess of the contracts' book value over the contractual cost of existing guaranteed benefits. Petitioner's brief at 8.

> If the policy guarantees basic payments but other payments may vary with, e.g., investment performance, then *the variable part of the policy and assets attributable thereto* are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077 (emphasis added) ("ERISA Conf. Rep."). As the brief of the United States admits, "The Conference Committee's use of the word 'payments' rather than 'benefits' and its reference to the 'variable part of the policy' make more plausible the court of appeals' inference that Congress was thinking of payments to plans rather than payments to plan beneficiaries . . . ." U.S. at 21.

In addition, contrary to the protestations of Hancock and its *amici*, the legislative history makes clear that Congress anticipated that disruptions would occur in the insurance industry due to enactment of ERISA.

> The Committee is aware that there exists various established and recognized practices which are accepted in commercial banking, trust and insurance companies, investment companies and other advisors in connection with employee benefit plans. However, notwithstanding current acceptance of such practices, the Subcommittee has found it difficult to establish definitive criteria concerning those practices which should be specifically proscribed. The difficulty was weighed . . . against the overriding need to protect workers' pension funds, and [the Committee] concluded that the latter's interest outweighed any current attempt to define all practices and relationships which constitute not only actual but real potential threats to the security and preservation of the pension funds.

S. Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4868.

Moreover, in order to minimize such disruptions, ERISA contains transition periods and procedures under which relief may be obtained. *See* ERISA §§ 408, 414.

> [T]he Secretary of Labor is authorized by the Act to waive any proscribed practice as long as it is consistent with the purposes of the Act and determined to be in the interests of pension plan participants. *The Committee is not unaware of the possible impact of these prohibitions*, and accordingly has made provision in the bill for an adequate transition period of 3 years, or longer, if warranted.

S. Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. at 4868 (emphasis added). "The conferees recognize that some transactions which are prohibited . . . nevertheless should be allowed in order not to disrupt the established business practices of financial institutions . . . consistent with adequate safeguards to protect employee benefit plans." ERISA Conf. Rep. at 5089-90.

These statements clearly demonstrate Congress' recognition of the impact of ERISA. The Third Circuit is simply incorrect in stating that Congress did not indicate its awareness of such disruptions. *See Mack Boring*, 930 F.2d at 275 n.17.

II. THE BRIEF OF THE UNITED STATES TAKES A NEW POSITION THAT COMPLETELY MISREADS ERISA § 401(b)(2); AS NOW INTERPRETED BY THE DEPARTMENT OF LABOR, IB 75-2 CONTRADICTS ERISA AND EXCEEDS THE DEPARTMENT'S REGULATORY AUTHORITY

The United States contends that the consistent position of the Department of Labor, since at least 1978, has been that all general account assets are excluded from ERISA fiduciary rules, except to the extent that they support variable benefits. However, the United States also claims that ERISA § 401(b)(2) is ambiguous and

would support both its interpretation and that of the Second Circuit.[3] "[T]he court of appeals' narrower construction . . . also finds support in the statutory text and has some advantages as a matter of policy." U.S. at 12.

As the record reveals, there is far more evidence that the statutory exemption is narrow and understandable, while the Department's position has been ambiguous and inconsistent. The Department's view that the enacted version of ERISA § 401(b)(2) and its legislative history "probably intended a relatively modest change" from the proposed broad exception is speculative at best and is not substantiated by the statute or its legislative history. U.S. at 10. Furthermore, the Department has no authority to take a position that conflicts with or undermines the plain words of the statute. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989).

Interestingly, the briefs of the petitioner and its *amici* contradict one another in their conclusions regarding the Congressional intent underlying ERISA § 401(b)(2). The allegedly consistent interpretation of the Department of Labor——that the purpose of § 401(b)(2) was solely to bring variable annuities sold from general accounts within the definition of "plan assets"—was clearly rejected by Hancock and its other *amici*. They state, without any caveats, that variable annuities may not be sold from insurance company general accounts.[4] If true, then

[3] The brief also takes pains to distance the United States from the excesses of the petitioner's and other *amici's* arguments concerning the McCarran-Ferguson Act and the Third Circuit's and district court's misguided arguments concerning defined benefit plans.

[4] Hancock at 17, 19 n.30, 20 n.32; ACLI at 9 n.8, 11; NYMA at 4 n.3 ("only fixed benefit payments may be made from an insurer's general account. New York law permits the payment of variable benefits, but only from a separate account.")

the "relatively modest change" that the United States contends was made by the Conference Committee in finalizing ERISA § 401(b)(2) is not only "modest," it is nonexistent.

The United States rightly disagreed with the incorrect reading of the intent of ERISA in connection with defined benefit plans that was developed by the district court and adopted by the Third Circuit. U.S. at 22. Those opinions limit the protection of ERISA to individual benefit payments. *Mack Boring*, 930 F.2d at 273; *Harris I*, 722 F. Supp. at 1012. Rejecting that analysis, the United States writes, "The protections provided by ERISA do not extend solely to the treatment of participants and beneficiaries, to the exclusion of pension plans." U.S. at 22. However, the United States fails to acknowledge that this incorrect reading of ERISA's intent was a linchpin of those decisions.

ERISA clearly intends that pension plan investments be protected so that the funds invested by plans today will be available to pay promised benefits, whether defined or not, in the future. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 n.5 (1981). Congress was well aware that, due to malfeasance and imprudence by pre-ERISA plan administrators and investment managers, funds were often lacking when the time came to pay promised benefits to retirees.

The United States contends that this concern did not extend to pension investments in insurance company general accounts. U.S. at 23. The statute makes clear that Congressional concern only ebbed "to the extent" that the insurance companies guaranteed the payment of retirement benefits. ERISA § 401(b)(2)(B). Beyond that narrow safe-harbor, Congress had the same concerns with insurance company general accounts as it did with insurance company separate accounts, banks, investment managers and the like. ERISA Conf. Rep. at 5,077.

In fact, it is only "to the extent" that group annuity contracts provide individual retirees with guaranteed benefits that state insurance guaranty funds provide protection upon the insolvency of an insurance company. *See, e.g.*, Mass. Gen. Laws Ann. ch. 175, § 146(B)(4)(B)(2) (West 1993); N.Y. Ins. Law § 7703(b)(2) (McKinney 1993). This distinction made under state law is consistent with Congress's "guaranteed benefit policy" exemption and the belief that state laws protect workers and retirees only to the extent of individual benefit guarantees. Under state law, pension plans with group annuity contracts become general unsecured creditors of the insurer with respect to the non-guaranteed, "free funds" portion of the contract, with no entitlement to guaranty fund protection upon the insurer's insolvency. *Id.* If under well-recognized state insurance law concepts, funds not associated with benefit guarantees are not entitled to state guaranty fund protection, those funds should not be deemed guaranteed for ERISA purposes.

It should be noted that the federal government, through the Pension Benefit Guaranty Corporation (PBGC), may be at risk for the non-guaranteed portion of the retirement benefits promised under the pension plan. The PBGC insures pension benefits promised under most defined benefit pension plans. The PBGC has long claimed to be in financial distress and currently projects its potential deficit in excess of pension plan liabilities at up to $50 billion. It would be contrary to federal pension policy to exempt insurance industry controlled non-guaranteed general account assets from the fundamental fiduciary protections of ERISA, while leaving the PBGC at risk for any financial mismanagement or malfeasance of an insurance company due to court-created exemptions from federal law.

The crux of the United States' argument appears to be that the Department of Labor's 1975 Interpretative Bulletin, IB 75-2, on prohibited transactions (amended in

1978) created "settled expectations" within the insurance industry that group annuity contracts were completely exempt from the fiduciary rules and therefore, should not be disturbed by the courts. But, the Department of Labor's Interpretive Bulletin and its subsequent opinions are so ambiguous and inconsistent that the insurance industry would have been foolhardy to assume such a broad exemption. The insurance industry has never had any "settled expectations" concerning ERISA § 401(b)(2)(B).

Because, on its face, IB 75-2 refers only to prohibited transactions, the insurance industry had to be aware that any extension to the broader fiduciary responsibility rules rested on shaky foundations and likely exceeded the Department's authority. Certainly, the Seventh Circuit's 1983 *Peoria Union* decision eliminated any unquestioned basis for reliance upon IB 75-2(b). Aware of its tenuous position, the insurance industry tried to amend ERISA § 401(b)(2)(B) both before and after the Seventh Circuit's decision—*see* S. 3017, 95th Cong., 2d Sess. § 261 (1978), *reprinted in* ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Senate Committees on Labor and Human Resources and Finance, 95th Cong., 2d Sess. 40 (1978); S. 209, 95th Cong., 2d Sess. § 141 (1979), *reprinted in* ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Committee on Labor and Human Resources, 96th Cong., 1st Sess. 33 (1979)—both of which would have amended ERISA § 401(b)(2) to exempt all general account assets. In testimony before the Senate Labor and Human Resources Committee in February 1979 on S. 209, representatives of the insurance industry argued for changes to ERISA § 401(b)(2) that ". . . would make clear that, in the case of a plan which is funded by a contract or policy of insurance based on the company's general account, it is the contract that constitutes the plan asset, and not the underlying assets of the insurance company." ERISA Improvements Act of 1979: Hearings on S. 209

Before the Senate Committee on Labor and Human Resources, 96th Cong., 1st Sess. 851 (1979) (Statement of William T. Gibb and Paul J. Mason, on behalf of ACLI). However, industry representatives wanted the language proposed in section 141 of S. 209 to be "modified to refer to 'a contract issued by an insurance company', rather than to 'a contract or policy of insurance.' This would reflect the fact that some contracts used to fund employee benefit plans do not contain permanent guarantees. This may be so because the employer does not wish to purchase such guarantees or because the tax results are better without them or because of a combination of these reasons." *Id.* Thus the industry recognized that the statutory language of ERISA had to be amended to provide a broad exemption from the fiduciary rules necessary to accommodate the non-guaranteed portion of insurance policies or contracts such as that at issue here.

Furthermore, in connection with its attempts to issue a "plan asset" regulation more broadly applicable to ERISA's fiduciary rules,[5] the Department was besieged by insurance industry representatives seeking to write a complete general account exemption into the regulation. A 1979 proposal would have provided relief to the insurance industry, *see* 44 Fed. Reg. 50,363, 50,366 (Aug. 28, 1979), but was withdrawn in 1985. Thereafter, no similar provision was ever proposed by the Department.[6] The insurance industry was left only with the statement in the final Plan Asset regulation that the Department was leaving its position on prohibited transactions under IB 75-2(b) undisturbed. 29 C.F.R. § 2510.3-101 (1986).

---

[5] The Congress, after 10 years of inaction by the Department, finally ordered the DOL in 1985 to issue its final regulation no later than Dec. 31, 1986. ERISA § 505.

[6] 29 C.F.R. § 2510.3-101 (1986). The final regulation merely states that IB 75-2(b) is unaffected by the regulation.

III. A COMPLETE EXEMPTION WOULD ELIMINATE FEDERAL PROTECTION FOR TENS OF MILLIONS OF WORKERS AND RETIREES; THE INSURANCE INDUSTRY HAS OVERSTATED THE DIFFICULTIES OF COMPLYING WITH ERISA

The overriding purpose of ERISA was to protect the retirement and other benefits promised to tens of million of workers, retirees, and their beneficiaries. The fiduciary obligation to invest pension plan monies prudently and solely in the interest of workers and retirees is crucial to making the protections of ERISA meaningful. If the insurer is not a fiduciary as to the pension assets over which it has discretionary control and has provided no retirement guarantee, then tens of millions of workers, retirees and their beneficiaries have lost their protection under federal law. The insurer, not the pension plan, controls the pension monies. The group annuity contract cannot be terminated without triggering the purchase of below market insurance annuities. The workers and the pension plan would be trapped, unable to protect their retirement benefits and unprotected by federal and state law. Such a result would make the promises and protections of ERISA meaningless.

The insurance industry repeatedly has claimed that it cannot modify its general account contracts to comply with both ERISA and state insurance laws. But the history of the insurance industry is replete with examples in which the industry, when forced by law or financial necessity, has found the wherewithal to do so. After the enactment of ERISA, most insurance company products sold to pension plans were revised. Entire new lines of insurance and investment products were created to meet the need of pension plans for stable and safe investments. Even in the instant case, John Hancock agreed to modify its group annuity contract on numerous occasions, including its 1988 agreement to return nearly $53 million to the plan. The insurance industry is hiding behind state law in order to deny the ability to provide separate pen-

sion plan accounts, even though the industry admits that most states allow insurance companies to maintain separate accounts for pension plans. *See* American Council of Life Insurance, *1992 Life Insurance Fact Book*, p. 57 (1992).

Another insurance industry investment product, the guaranteed investment contract (known as a GIC) also faced similar industry claims. After group annuity contracts, GICs are the next most popular insurance company product. Pension plans have hundreds of billions of dollars invested in GICs. Prior to 1991, most GICs were invested as part of an insurer's general account assets. As insurance company investment returns declined, many pension plans sought to create separate account GICs. The insurance industry resisted segregating its accounts, similarly claiming financial impossibility and conflict with state law. But, after the bankruptcy of the Executive Life Insurance Company, in which hundreds of pension plans were left holding worthless GICs which were not covered by most state guaranty funds, the insurance industry overnight was able to create a new insurance product—the separate account GIC.

Moreover, it is clear that ERISA and state insurance laws can and do co-exist. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (ERISA contemplates dual regulation of insured pension plans); *Chicago Board Options Exchange, Inc. v. Connecticut General Life Ins. Co.*, 713 F.2d 254, 260 (7th Cir. 1983). Insurance companies are subject to many of ERISA's requirements and take refuge in ERISA's preemption of state laws particularly as it has been read by the Court to limit remedies for violations of the law. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). The Department of Labor similarly rejects the insurance industry's assertions that dual regulation under ERISA and state insurance law is an impossibility. U.S. at 23 n.12.

Since 1975, the states and the federal government have regulated insurance company separate accounts without apparent difficulty. *See, e.g.*, N.Y. Ins. Law § 4240 (McKinney 1993); N.J. Stat. Ann 17B:28-1 to 17B:28-15 (West 1993); N.Y. Comp. Codes R. & Regs., Title 11, Chapter III, Part 50 "Separate Accounts and Separate Account Annuities"; N.Y. Comp. Codes R. & Regs., Title 11, Chapter IV, Part 97 "Market Value Separate Accounts Funding Guaranteed Benefits; Separate Accounts Operations and Reserve Requirements." In the context of separate accounts, the insurance industry has made ample use of the administrative procedures that ERISA provides and could do so in the future in order to secure any administrative relief which might be necessary to conform its contracts to the Second Circuit opinion. *See, e.g.*, DOL PTE 81-82, 46 Fed. Reg. 46,443 (Sept. 18, 1981); DOL PTE 88-92, 53 Fed. Reg. 38,798 (Oct. 3, 1988).[7]

Insurance company claims of impossibility are of questionable merit and should not be the basis on which this case is decided. Congress intended to provide broad protection to the retirement and other benefits promised to tens of millions of workers, retirees and their families and only permitted exceptions where other adequate protections existed. Upon a decision of this Court affirming the Second Circuit's interpretation of the statute, the insurance industry and the Department can begin the process of developing a workable scheme to comply with the law.

---

[7] For instance, under its authority to grant class exemptions, ERISA § 408(b)(1), the Department could easily convert IB 75-2 into a class-wide ERISA § 406 exemption, thereby eliminating the hypothetical problem of prohibited tranactions in connection with general account contracts.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

HON. HOWARD M. METZENBAUM
U.S. Senator
Counsel of Record
140 Russell Senate Office Building
Washington, D.C. 20510
(202) 224-2315

Counsel for Amici Curiae
Hon. Howard M. Metzenbaum,
Hon. Paul Simon,
Hon. Paul Wellstone,
Hon. Barbara Boxer,
Hon. Pat Williams,
Hon. William L. Clay

July 9, 1993